



November 19, 2001

Ms. Elaine S. Hengen  
Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

OR2001-5349

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155063.

The City of El Paso Police Department (the "department") received a request for all documents pertaining to Internal Affairs case number IA01-149. You inform us that, upon receipt of payment, the department will release to the requestor 51 pages of documents and an audio tape. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.108, 552.117 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin with your claims under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You raise section 552.101 for the documents you submitted as Exhibit E, which you describe as compilations of the department's criminal history record on certain individuals, and for information you highlighted in pink in Exhibit F, which, you say, are references to the information in Exhibit E. You bring this section 552.101 claim in conjunction with the common law right to privacy.

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430

U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We believe that the release of the information in Exhibit E and a portion of the information in Exhibit F would implicate individuals' right to privacy. Thus, we conclude that you must withhold this information under common law privacy as encompassed by section 552.101 of the Government Code.<sup>1</sup> See *id.* We have marked the information accordingly.

Portions of Exhibit E and F include information about juvenile offenders. Section 552.101 encompasses confidentiality provisions such as Family Code section 58.007. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Some of the information in Exhibits E and F involve juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, the requested information is confidential pursuant to section 58.007(c) of the Family Code. Thus, you must withhold the law enforcement information about juvenile offenders based on section 552.101 of the Government Code on the additional ground of

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<sup>1</sup>In light of this conclusion, we need not consider your other claims for withholding portions of this information.

Family Code section 58.007. We note that section 58.007 does not apply to one of the juvenile reports that involves juvenile conduct that occurred on August 7, 1996. That 1996 report is nevertheless excepted from disclosure as confidential criminal history information, as we have stated above.

Section 552.101 also excepts from disclosure information made confidential by statute. You argue that article 61.03 of the Code of Criminal Procedure governs the release of information in two Exhibits, Exhibit D in its entirety, which, you say, contains intelligence information relating to a criminal street gang, and the information you highlighted in yellow in Exhibit F, which you say contains references to the information in Exhibit D.

Chapter 61 of the Code of Criminal Procedure concerns criminal justice agency compilation of information pertaining to criminal combinations and criminal street gangs. Article 61.03 reads as follows:

(a) A criminal justice agency that maintains criminal information under this chapter may release the information on request to:

- (1) another criminal justice agency;
- (2) a court; or
- (3) a defendant in a criminal proceeding who is entitled to the discovery of the information under Chapter 39.

Furthermore, article 61.05 of the Code of Criminal Procedure provides that release of the information to a person who is not entitled to the information is a Class A misdemeanor. *See also* Code Crim. Proc. arts. 61.01(3) (defining "criminal information" as facts, material, photograph, or data reasonably related to the investigation or prosecution of criminal activity), .04 (a) (permitting criminal information relating to child associated with a combination or street gang to be compiled and released under chapter 61 regardless of child's age). We have reviewed the information at issue and, based on your representations, conclude that article 61.03 is applicable to Exhibit D and the portions of Exhibit F you have highlighted in yellow, with one exception, as well as additional information we have marked in Exhibit F as covered by section 61.03. Accordingly, the department must withhold this information from the requestor based on section 552.101 of the Government Code.

You bring your section 552.108 claim for a police officer's pager number that appears on an employee record in Exhibit B. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation

on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You explain that the pager associated with the pager number is used for official police business only. You further state that "the release of the cellular phone numbers assigned to police officers, particularly officers who conduct special operations such as the CRASH anti-gang unit involved here, will interfere with their law enforcement and law enforcement-related duties. Speciality unit officers are in a position with great responsibility and they need to operate without interruptions from non-work related pages." We conclude that the department has shown that the release of the police officer pager number would interfere with the detection, investigation, or prosecution of crime. *See* Open Records Decision No. 506 (1988). Thus, the department may withhold the number from public disclosure based on section 552.108.

The requested records contain information that is excepted from disclosure under section 552.117(2). The city must withhold those portions of the records that reveal the police officer's home addresses, home telephone numbers, family member information, and social security number.

The records also contain a complainant's social security number. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Open Records Act on the basis of that federal provision. We caution, however, that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, we turn to section 552.130, which provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the photocopy of the Texas driver's license, the Texas driver's license numbers, and the license plate number under section 552.130.

In summary, based on section 552.101, the department must withhold the compilations of criminal history records, the juvenile offender information, and the intelligence information pertaining to street gangs. Based on section 552.108, the department may withhold the police officer pager numbers. The department must withhold the complainant's social security number based on section 552.101 if it was obtained or is maintained pursuant to any provision of law enacted on or after October 1, 1990. Finally, the department must withhold the information subject to sections 552.117 and 552.130.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

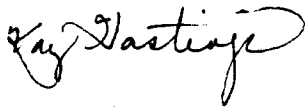
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kay Hastings".

Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/seg

Ref: ID# 155063

Enc. Submitted documents

c: Mr. Tom Barbee  
EPMPOA  
747 East San Antonio Avenue, Suite 103  
El Paso, Texas 79901  
(w/o enclosures)